



EMPLOYMENT TRIBUNALS

Claimant: Ms R Ducasse

Respondent: Hounslow & Richmond Community Healthcare NHS Trust

Heard at: London South (in private by CVP) **On:** 5 March 2024

Before: Employment Judge Heath

Appearances

For the claimant: In person

For the respondent: Mr B Jones (Counsel)

JUDGMENT

The claimant is to pay a contribution towards the respondent's costs in the sum of £1200.

REASONS

Introduction

1. This is the determination of an application for costs made at a hearing on 5 March 2024. The application was made on the basis of Rule 76(2) and Rule 76(1)(a) Employment Tribunals Rules of Procedure 2013 ("ET Rules"). This decision is to be read in conjunction with the Record of a Preliminary Hearing ("Record") sent to the parties on 12 March 2024.

Procedure

2. As set out in the Record, the hearing on 5 March 2024 was due to be the first day of the final hearing of this matter. It was converted into a public preliminary hearing to consider a strike out application of the claimant's claims, or in the alternative an application for unless orders. I refused the first application but granted the second.

3. The respondent applied for its costs as set out in paragraphs 8 to 11 of the Record. Pursuant to the Case Management orders at paragraphs 15 and 16 the claimant emailed her responses to the application for costs on 12 March 2024 by emailing a schedule setting out her income of £2145.31 per month and outgoings of £2191.09 per month. On 25 March 2024 the claimant sent another email in which she referred to the following:

- a. She was a disabled litigant in person, disabled by Multiple Sclerosis (“MS”) which was aggravated by stress.
- b. The Equal Treatment Bench Book (“ETBB”) suggests adjustments for case management which include avoiding overloading litigants with orders and dates for case preparation.
- c. EJ Cox on 13 November 2023 observed that case management was to a “tight timetable”.
- d. The claimant set out the timetable for relevant orders proposed by the respondent on 10 January 2024.
- e. The claimant referred to having emailed the respondent on 25 January 2024 saying that she had been signed off sick with stress. She referred to putting the respondent on notice that her health was interfering with her ability to attend to case preparation. She observed the respondent might have notified the tribunal of this.
- f. The claimant accepted that I had said (in summarising Mr Jones’ costs application) that the breaches were “*significant, culpable and causative of the wasted costs*”.
- g. The claimant referred to Note 7 of the Presidential Guidance - General Case Management (2018) (“PGGCM”) and submitted her culpability did not have the aggravating factors referred to at paragraphs 13 to 15. She observed that costs orders were not the norm.

The Law

4. Rule 75 ET Rules provides:

- (1) *A costs order is an order that a party ('the paying party') make a payment to—*
- (a) *another party ('the receiving party') in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*

5. The power to make a costs order is in Rule 76 which provides:

- (1) *A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
- (a) *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

- (2) *A Tribunal may also make such an order where a party has been in breach of any order or practice direction where a hearing has been postponed or adjourned on the application of a party.*

6. Rule 84 ET Rules provides:

“In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay”.

7. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

8. Such awards can be made against unrepresented litigants, including where there is no deposit order in place or costs warning (*Vaughan v London Borough of Lewisham* UKEAT/0533/120).

9. Where costs are awarded under Rule 76(2) there is no need to find that the party has acted vexatiously, abusively, disruptively or otherwise unreasonably. It is sufficient that they are clearly responsible for the breach.

10. In terms of abusive, disruptive or unreasonable conduct, “unreasonableness” bears its ordinary meaning and should not be taken to be equivalent of “vexatious” (*National Oilwell Varco UK Ltd v Van de Ruit* UKEAT/0006/14).

11. Guidance has been given by the Court of Appeal in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 on the approach to assessing unreasonable conduct:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had”.

12. The tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (*MacPherson v BNP Paribas (London Branch)* (No 1) [2004] ICR 1398).

Conclusions

13. There are three stages in determining whether or not to award costs under Rule 76 ET Rules; first, whether the party has reached the threshold of establishing that one of the grounds for making an order under Rule 76 is made out. Second, if the threshold has been reached, the tribunal will go on to consider whether it is appropriate to make an order for costs. Finally, if it is appropriate to make an order for costs tribunal will go on to consider the amount.

Threshold

14. As regards Rule 76(2), orders were made by Employment Judge Cox on 13 November 2023 obliging: the claimant to produce a schedule of loss by 4 December 2023; the parties to exchange lists of documents by 5 January 2024, to request copies of documents by 10 January 2024 and to send copy documents by 15 January 2024; the parties to agree a bundle by 25 January 2024 which the respondent would send to the claimant by 9 February 2024. The parties were to exchange witness statements by 19 February 2024. The claimant sought to extensions of time to comply with the order to produce a schedule of loss. In the event she did not provide one until 30 December 2023, when she sent an incomplete one. The claimant simply has not produced a list of documents despite requesting extensions of time. The knock-on effect of this was that the respondent was unable to prepare a bundle, no witness statements could be prepared and the final hearing of 5 March 2024 had to be vacated.
15. The claimant has clearly met the threshold of Rule 76(2) in that she has been in breach of a number of orders.
16. In terms of acting unreasonable in the way that proceedings have been conducted, I note that the respondents applied to strike out the claim on the basis that the conduct of the claimant had been unreasonable.
17. I did not strike out the claim on that basis. However, in making this decision I observed that the claimant's failure to comply with orders had been "major failings" which led to the trial being ineffective. I observed that the claimant's medical evidence in support of her difficulties with case preparation did not appear to address her ability to prepare her case. I further noted that, for the most part, her medical issues did not prevent her from working full-time. I concluded that the evidence did not give satisfactory reasons why the claimant had defaulted in terms of the orders. I commented that the respondent was put to the prejudice of losing a trial date, of their witnesses having serious allegations hanging over them (one of whom had retired and another of whom no longer works for the respondent), and that a final hearing could not take place for a significant period of time. I indicated that I was persuaded, but "only just" that it was possible to have a fair hearing the following year. I also took the view that a less Draconian order than strike out, namely the making of unless orders, was an appropriate way forward. In a nutshell, I exercised my discretion not to strike out the claim despite finding the claimant's conduct of it unreasonable.
18. In the circumstances I find that the claimant has met the threshold for an order under Rule 76(1)(a).

Appropriateness of order

19. The basis of the respondent's application is pretty simple. It says that the late partial compliance with the order to produce a schedule of loss and, more to the point, her complete failure to comply with orders in respect of production of documents led to the final hearing being vacated. It incurred counsel's brief fee because of the lateness of the vacation of the hearing. This was entirely due to the claimant's unreasonable defaults.
20. The claimant's resistance effectively centres around the fact, she says, that her disabling medical condition hampered her ability to prepare. Her

suggestion that an appropriate adjustment under the ETBB might have been to avoid overloading her with orders for case preparation, and her suggestion that EJ Cox observed that the timetable for case preparation was “tight”, hints at an after-the-event challenge to the suitability or appropriateness of the orders.

21. However, I note that EJ Cox’s reference to the “tight timetable” was in the context of the respondent resisting an application to amend which would have expanded the scope of the claimant’s case at a late stage in proceedings. I also note that the claimant at no stage challenged the appropriateness of the timetable for the Case Management orders. I also remind myself that the medical evidence adduced by the claimant did not support the narrative that the claimant was too unwell to prepare for the final hearing.
22. While I do not to consider the issue of unreasonableness when considering whether to make an order under Rule 76(2), the respondent also puts its under Rule 76(1)(a). Notwithstanding the claimant’s after-the-event apparent challenge to the appropriateness of the orders of EJ Cox, I find that she has been unreasonable in the conduct of proceedings, and that such conduct led to the late vacation of the final hearing that considerable expense and inconvenience to the respondent and its witnesses.
23. Accordingly, I conclude that it is appropriate to make an order for costs.

Amount of order

24. The respondent seeks the brief fee incurred as a result of the late vacation of the hearing. I find that this is reasonable both in principle, and in terms of the amount.
25. I have regard to the claimant’s means. She has set out what appears on the face of it to be a cogent and credible schedule of income and outgoings which, basically, sets out that her outgoings are about £50 per month more than her income. The claimant has set out that she pays a mortgage, but has not set out what, if any, equity there is in the home.
26. Taking all matters into account I consider that it would be appropriate to order the claimant to make a contribution to the respondent’s costs. In assessing what this should be, I have considered that a sum of £1200 is appropriate. The claimant’s income versus outcomings schedule is such that I consider that it would not cause undue hardship for her to find around £50 per month and pay this over the course of two years. This would go some way towards compensation the respondent for the expenditure it has been put to in paying the wasted brief fee of Mr Brown.

Employment Judge **Heath**

22 April 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>